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In The
Supreme Court of the United States

DALLAS E. BUTLER, ET AL.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF SOUTHWEST AIRLINES CO. IN SUPPORT OF PETITIONER

ROBERT W. KNEISLEY
Counsel of Record
Southwest Airlines Co.
1901 L Street, N.W., Suite 640
Washington DC 20036
Telephone: (202) 263-6284

DEBORAH ACKERMAN
Vice President – General Counsel
2702 Love Field Dr.
Dallas, TX 75235
Telephone: (214) 792-4000

Attorneys for Amicus Curiae Southwest Airlines Co.

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OR CALL COLLECT (402) 342-2831

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BRIEF *AMICUS CURIAE* OF SOUTHWEST AIRLINES CO. IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Southwest Airlines Co.[1] Petitioners and Respondent have consented to the filing of this *amicus curiae* brief, as indicated by the letters submitted with the filing of this brief.

INTEREST OF *AMICUS CURIAE*

Southwest Airlines Co. (hereafter "Southwest" or "Southwest Airlines"), the largest commercial airline in the United States in terms of passengers boarded, provides point-to-point, low-fare service to 60 cities in 31 states. In operation since 1971, Southwest currently serves more than 70 million passengers annually with a fleet of over 400 Boeing 737 aircraft operating approximately 2,900 flights daily. Headquartered in Dallas, Texas, Southwest has approximately 31,000 Employees nationwide and has one of the best overall Customer Service records in the U.S. airline industry. With annual revenues exceeding $6,500,000,000 in 2004, Southwest is a Fortune 500 company and one of the few profitable U.S. airlines.

Southwest is directly impacted by this case because it employs over 4,500 pilots, many approaching the age of 60. In fact, Michael L. Oksner, a Petitioner in this case, was

[1] This brief was not authored in whole or in part by counsel for a party. *See* Sup. Ct. R. 37.6. It was authored by in-house counsel for Southwest Airlines Co. In addition, no person or entity, other than Southwest Airlines Co., its members, and its counsel, made a monetary contribution to the preparation or submission of the brief.

recently forced to retire from Southwest Airlines when the Federal Aviation Administration ("FAA") denied his petition for an exemption from the "Age 60 Rule." That rule, codified at 14 CFR §121.383(c), requires pilots operating under Part 121 of the FAA's regulations (*i.e.*, virtually all U.S. commercial airline pilots) to retire on their 60th birthday.

The direction and authority to evaluate this case and to file an *amicus curiae* brief herein came from Herbert D. Kelleher, co-founder and Executive Chairman of the Board of Southwest Airlines.

SUMMARY OF *AMICUS* ARGUMENT

Southwest Airlines urges the Supreme Court to grant *certiorari* as requested by the Petitioners in this case, *Butler, et al. v. Federal Aviation Administration, et al., D.C. Cir. No. 03-1386 (September 24, 2004).* The Petitioners challenge the FAA's rigid application of its Age 60 Rule, which requires all commercial pilots employed by Part 121 air carriers to retire at the age of 60 regardless of individual pilot abilities or health conditions. The current Age 60 Rule was adopted by the FAA 45 years ago and is based on obsolete data that has been superceded and refuted by more recent medical findings. This rule, coupled with the FAA's practice of automatically denying all pilot requests for exemptions regardless of merit, is arbitrary and injurious to Southwest Airlines. Exemptions for physically and mentally qualified pilots from the Age 60 Rule should be allowed to accomplish the FAA's dual statutory mandates of maximum safety and optimal efficiency in United States commercial aviation. The court below erred in acceding to

the FAA's argument that the case should not even be heard on the merits.

AMICUS ARGUMENT

I. The FAA's Application of the Age 60 Rule Without Consideration of Individual Pilot Abilities, Health Conditions, or Current Medical Data is Not Justified.

The FAA's practice of automatically denying all pilot requests for exemption from the Age 60 Rule is not medically justified. The mandatory retirement rules for pilots were established in 1959 – 45 years ago. Today, FAA data shows that pilots over age 60 are as safe as, and in some cases safer than, their younger colleagues. For example, the FAA released the Hilton study in 1993, which stated "the data for all groups of pilots were remarkably consistent in showing a modest decrease in accident rate with age [and] no hint of an increase in accident rates as pilots near age 60."[2] In addition, the National Institute of Aging stated in 1981 that "the Age 60 Rule appears indefensible on medical grounds" and "there is no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement."[3] Both medical technology and medical services, as well as the aging process itself, have dramatically improved since 1959. Southwest Airlines is familiar with, and agrees with, these medical studies which have concluded that there is no current health

[2] Hilton Systems, Incorporated. Kay et al. (1994).

[3] 149 CONG. REC. 63, S5607 (April 30, 2003) (Statement of Senator Inhofe (for himself, Mr. Stevens, and Mr. Burns) on the Introduction of S.959, Bill to Abolish the FAA's Age 60 Rule).

justification for automatically grounding all commercial airline pilots upon turning age 60.

Captain Joseph "Ike" Eichelkraut, President of Southwest Airlines Pilots' Association and a pilot with 25 years of experience flying both military and commercial aircraft, testified on the Age 60 Rule before the Senate Special Committee on Aging on September 14, 2004.[4] His testimony explains the many safeguards that are already in place to ensure pilots of all ages are healthy and medically fit to fly:

> The FAA already has the ideal mechanisms in place for ensuring safe pilots at *any* age . . . To retain my license and fly for Southwest Airlines, I must pass semi-annual flight physicals, administered by an FAA licensed medical examiner, that include an annual EKG. I must also demonstrate complete knowledge of safe piloting skills, systems and procedures, and semiannual check rides and advanced simulators.
>
> Pilots must also successfully pass semiannual simulator training and flight checks designed to evaluate the crewmember's ability to respond to various aircraft emergencies and/or competently handle advances in flight technology and the Air Traffic Control environment . . . There is no greater test of cognitive ability and mental dexterity than these simulator rides . . . The 59 year old Captain arrives at this point in his career having demonstrated successful performance

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[4] *A Fresh Look At Mandatory Retirements: Do They Still Make Sense? Hearing Before the Senate Special Comm. on Aging*, 108th Cong., 2004 WL 2052540 (F.D.C.H.) (Statement of Captain Joseph "Ike" Eichelkraut, President, Southwest Airlines Pilots' Association).

following years of this kind of scrutiny. FAA studies have verified the superior level of safety exhibited by this senior Captain.

The documentary evidence – disclosed in the record of this case – reveals that the FAA's automatic denial of all age exemptions has no tangible safety purpose. The FAA itself even granted exemptions from the Age 60 Rule in the early 1990's to commercial pilots of foreign carriers. (Petitioners' Record Below at Exhibit HH). Because the undistorted data of pilot performance shows that older, more experienced pilots have excellent safety records, it clearly is in the interest of both the airlines and their passengers to allow qualified, medically-certified pilots to fly beyond age 60.

II. The FAA's Inflexible Application of the Age 60 Rule Undermines U.S. Airline Economics and Disserves the Traveling Public.

The 1950s-era Age 60 Rule, coupled with the FAA's rigid implementation of it, arbitrarily deprives Southwest Airlines of some of its best pilots at the peak of their careers. Southwest, which employs over 4,500 highly-skilled professional pilots, believes that the arbitrary rejection of all age exemption requests disserves the public interest by depriving commercial airlines of leadership and experience in the cockpit. This inflexible approach inhibits the industry from achieving maximum safety as well as optimal efficiency in passenger airline operations. The flight experience and training accumulated over the career of a professional pilot approaching the age of 60, along with the investment in training by that pilot's airline employer such as Southwest, is enormous. Commercial pilots have the potential for years of safe, productive aviating ahead of

them beyond their 60th birthday. Many airlines could operate more efficiently, while maintaining the highest standards of safety, if qualified pilots were allowed to continue to fly beyond age 60.

Southwest Airlines Captain Michael L. Oksner, one of the 12 Petitioners in this case, was forced to retire on his 60th birthday, April 5, 2004, because of the FAA's denial of his individual Age 60 exemption request. Captain Oksner's safety performance and medical records were unblemished. Southwest believes that he should have been granted an exemption by the FAA to continue flying. The Petitioners in this case, including Captain Oksner, should have their requests for exemption considered on the merits, not arbitrarily denied by the FAA. The agency should be required to reach its decision on such exemption requests based on the safety performance and medical records of the individual pilots, not on an arbitrary, outdated standard that the FAA imposes on all pilots regardless of individual abilities. Accordingly, we urge the Court to grant *de novo* review of the Petitioners' case, and require the FAA to follow a reasoned standard of individual consideration of Age 60 Rule exemption requests pursuant to the agency's statutory power to grant exemptions from its regulations when in the public interest (49 U.S.C. § 44701(f)).

Moreover, the FAA has a statutory duty to consider exemptions in light of paramount safety requirements in air commerce, pursuant to 49 U.S.C. § 40101(a)(1). Without lessening safety, the FAA also has a duty to consider the economic health and efficiency of the nation's air carriers pursuant to 49 U.S.C. §§ 40101(a)(6)(A) (the FAA shall consider it in the public interest "to encourage efficient and well-managed air carriers to earn adequate

profits . . . "); and 40101(a)(7) (it is in the public interest for FAA to develop and maintain "a sound regulatory system that is responsive to the needs of the public. . . . "). Southwest Airlines' analysis of the issue has concluded that safer and more efficient operations will result from reasoned consideration – instead of arbitrary denial – of age exemption requests. Therefore, Southwest Airlines believes that the Petitioners' case must be heard, for the sake of both the health of U.S. commercial aviation and the safety of the flying public.

The FAA's arbitrary no-exemptions policy for commercial airline pilots should be ended, consistent with the public interest in air safety, because it serves no safety purpose. Pilots of smaller aircraft such as those operating under Parts 91 and 125 – 137, general aviation pilots, and certain test pilots are allowed to fly beyond age 60. In addition, at least 24 nations allow pilots to fly commercial aircraft past age 60.[5] These pilots share the same airways and runways with the large U.S. passenger airlines operating under Part 121. The safe performance of these pilots and others worldwide confirms that the FAA's asserted claim of a safety basis for its no-exemptions policy for Part 121 pilots is unfounded.

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[5] *A Fresh Look At Mandatory Retirements: Do They Still Make Sense? Hearing Before the Senate Special Committee on Aging,* 108th Cong., 2004 WL 2052541 (F.D.C.H.) (Statement of Russell B. Rayman, MD, Executive Director of the Aerospace Medical Association).

CONCLUSION

For the foregoing reasons, Southwest Airlines urges the Supreme Court to grant *certiorari* to the Petitioners in this case.

Respectfully submitted,

ROBERT W. KNEISLEY
Counsel of Record
Southwest Airlines Co.
1901 L Street, N.W., Suite 640
Washington DC 20036
Telephone: (202) 263-6284

DEBORAH ACKERMAN
Vice President – General Counsel
2702 Love Field Dr.
Dallas, TX 75235
Telephone: (214) 792-4000

Attorneys for Amicus Curiae
Southwest Airlines Co.